Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 18-60
Iowa Network Access Division	)	
Tariff F.C.C. No. 1.	)	Transmittal No. 36
	)	

OPPOSITION OF IOWA NETWORK SERVICES, INC. D/B/A AUREON NETWORK SERVICES TO AT&T'S PETITION FOR RECONSIDERATION

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SUMMARY

Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon") opposes AT&T's Petition for Reconsideration of the FCC's July 31, 2018 *Rate Order*, and generally supports the Commission's methodology to calculate the CLEC benchmark rate. However, Aureon does not concede that it is a competitive local exchange carrier ("CLEC") or that the CLEC benchmark rate or CLEC rate cap apply to Aureon. As a dominant provider of centralized equal access ("CEA") service, Aureon has always filed its cost-based tariff rates with required supporting materials as mandated by incumbent local exchange carrier ("ILEC") rate regulations. The Commission's rationales for its CLEC access charge rules, such as the need to regulate new market entrants, and to establish reasonable CLEC access rates, do not apply to Aureon's tariff rates subject to ILEC rate regulations. Aureon's authorization to provide CEA service since 1988 predates the FCC's order implementing the CLEC rate benchmark by 13 years, and Aureon has always been required to calculate its rates pursuant to Section 61.38 (applicable to dominant carriers) and Parts 32, 36, 64, and 69 (applicable only to ILECs). Reconsidering the Commission's classification of Aureon as a CLEC is the most efficient and legally supportable solution to the controversy AT&T has raised over how to apply Section 61.26(f) CLEC rate regulations to an ILEC-rated regulated service like CEA service.

If the FCC decides to uphold the *Rate Order* applying CLEC regulations to Aureon, AT&T's Petition should be denied for several reasons. First, AT&T mischaracterizes and misreads the language in the FCC's rules, the FCC's orders adopting the CLEC benchmark rate, and the *Rate Order* to reach AT&T's desired outcome to pay Aureon less. AT&T disingenuously adds additional requirements that are not in the FCC's orders or rules to contrive arguments that the Commission should have used a different approach to calculate the $0.05634 CLEC benchmark rate applicable to Aureon's CEA service. Second, the FCC correctly applied CenturyLink's per-mile tandem switched transport rate to the average weighted mileage for Aureon's network to determine the total tandem switched transport component in the composite benchmark rate. Third, the FCC's orders do not prohibit Aureon from receiving more than CenturyLink would receive for providing service over CenturyLink's own network because Aureon would receive the same amount that CenturyLink would receive for providing access service over Aureon's network. Finally, AT&T's concerns that the *Rate Order* would not constrain the exercise of monopoly power and encourage arbitrage are completely meritless. Aureon has always been regulated under the FCC's ILEC rules, and Aureon continues to be subject to the FCC's ILEC regulations, which ensure that Aureon's rates remain just and reasonable. As such, Aureon has always been treated more like an ILEC than a CLEC, and the application of non-dominant CLEC rules to Aureon is inapt.

TABLE OF CONTENTS

SUMMARY

I. INTRODUCTION 1

II. ARGUMENT 7

A. The Commission Correctly Interpreted and Applied its CLEC Benchmark Rate Rules to the Extent that Aureon is Even a CLEC. 9

B. The FCC Correctly Used Aureon's Actual Network and Average Weighted Mileage to Calculate Transport on a Per-MOU Basis. 12

C. The Benchmark Rate Calculated by the FCC Would not Provide Aureon With More Revenue Than CenturyLink Would Receive for Providing the Same Access Service. 16

D. AT&T's Assertions That the *Rate Order* Fails to Constrain Monopoly Power or Encourages Arbitrage are Without Merit Because Aureon's Rates Have Always Been, and Continue to be, Regulated Under Cost-Based ILEC Rules. 17

III. CONCLUSION 19

Exhibit A – Relevant Excerpts from AT&T's Answer and Counterclaims

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Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"), by its undersigned attorneys, and pursuant to Section 1.106(g) of the Commission's rules[1] and the Public Notice issued by the FCC on September 4, 2018,[2] submits this Opposition to the Petition for Reconsideration[3] filed by AT&T Services, Inc. ("AT&T") in the above captioned proceeding.

I. INTRODUCTION

The Commission should not impose the competitive local exchange carrier ("CLEC") rate cap or rate benchmark rules upon Aureon.[4] Aureon is a dominant carrier that has always been regulated as an incumbent local exchange carrier ("ILEC") and calculates its rates pursuant to Section 61.38 of the FCC's dominant carrier rules.[5] When the Commission first adopted the CLEC rate benchmark mechanism, the FCC stated that it was doing so because, among other things, it was important to have "new entrants' rates move toward and ultimately meet those of

[1] 47 C.F.R. § 1.106(g).

[2] *Public Notice,* Pleading Cycle Established for AT&T Petition for Reconsideration of Memorandum Opinion and Order in Iowa Network Access Division Tariff F.C.C. No. 1, DA 18-910 (rel. Sept. 4, 2018).

[3] AT&T Petition for Reconsideration, Iowa Network Access Division Tariff F.C.C. No. 1, Transmittal No. 36, WC Docket No. 18-60 (filed August 30, 2016) ("Petition").

[4] Aureon does not waive or concede any of its arguments or issues advanced in this proceeding.

[5] 47 C.F.R. § 61.38.

market incumbents," and it was necessary to establish a "'reasonable' CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking."[6] Neither of those rationales for the adoption of the CLEC access charge rules apply to Aureon.

First, Aureon is not a new market entrant, and the FCC's CLEC rules were never intended to apply to dominant centralized equal access ("CEA") providers, such as Aureon, that are regulated as ILECs. The Commission granted Section 214 authorization to Aureon in 1988 to build a fiber optic network to provide CEA service as a dominant carrier[7] – 13 years before the adoption of the *Seventh Report and Order* implementing the rate benchmark for non-dominant CLECs. Furthermore, as the Commission acknowledged in its November 2017 *Primary Jurisdiction Referral Order*, the CLEC benchmark rate adopted in the *Seventh Report and Order* applies only to non-dominant carriers:

> The Telecommunications Act of 1996 created its own dichotomy of local exchange carriers—ILECs and CLECs. Carriers (including all ILECs) that were subject to dominant carrier regulation remained as such and new entrants in the exchange access market (including most CLECs) were subject to *nondominant* regulation. Responding to substantial disputes regarding *nondominant* carrier switched access charges, the Commission in 2001 held that *non-dominant* CLECs could provide an IXC with, and charge for, interstate switched access services in one of two ways [– by tariff or by negotiated agreements].[8]

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[6] *In re Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9940, ¶ 44 (2001) ("*Seventh Report and Order*").

[7] *Application of Iowa Network Access Division for Authority Pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to Lease Transmission Facilities to Provide Access Service to Interexchange Carriers in the State of Iowa*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd. 1468 (1988) ("*Section 214 Order*").

[8] *AT&T v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, 32 FCC Rcd. 9677, ¶ 8 (2017) ("*Primary Jurisdiction Referral Order*") (citing *Seventh Report and Order*, 16 FCC Rcd. at 9975, ¶ 3) (emphasis added)).

Indeed, the *Seventh Report and Order* specifically noted that "no commenter favors subjecting CLECs to dominant carrier regulation", and the Commission's "benchmark approach was more desirable than subjecting CLECs to the panoply of [dominant carrier] ILEC regulation."[9] In contrast, Aureon is required to calculate its rates pursuant to Section 61.38 applicable to dominant carriers and has always been regulated as an ILEC, not a CLEC.

Furthermore, in 2007, the FCC issued a Notice of Proposed Rulemaking ("NPRM") in which it considered the adoption of new rules governing the tariffing of traffic-sensitive switched access services by LECs.[10] Consistent with the *Seventh Report and Order*, the FCC stated in the NPRM that "[c]ompetitive LECs are considered *nondominant* carriers and are thus subject to minimal rate regulation. Section 61.26 allows competitive LECs to tariff interstate access charges if the charges are no higher than the rate charged for such services by the competing incumbent LEC (the benchmarking rule)."[11] The *2011 USF/ICC Transformation Order* adopted Section 51.911(c) for CLECs, which incorporated the Section 61.26 non-dominant carrier rate regulations. The CLEC rate caps in Section 61.26 cannot apply to a dominant carrier like Aureon because Section 61.26 is contained in Subpart C of Part 61 of the Commission's rules, and is entitled "General Rules for Nondominant Carriers."

In the *2011 USF/ICC Transformation Order*,[12] the FCC considered alternative pricing proposals applicable to dominant carriers subject to Section 61.38. The Commission explicitly considered and rejected a proposal to require Section 61.38 carriers, such as Aureon, to

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[9] *Seventh Report and Order*, 16 FCC Rcd. at 9970, ¶ 124.

[10] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd. 17989 (2007) ("*2007 Just and Reasonable Rates NPRM*").

[11] *Id.* at 17994, ¶ 10 (emphasis added).

[12] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*2011 USF/ICC Transformation Order*").

benchmark their rates to the Bell Operating Company rate. The Commission affirmed that Section 61.38 carriers were required to continue to set their rates based on projected costs and traffic.[13] This confirmed that CLEC rate benchmarks did not apply to Aureon – a Section 61.38 carrier. Second, contrary to the rationale given by the FCC that rate caps and benchmarking were required for CLEC tariff rates in light of the "historical lack of regulation on the process of CLEC ratemaking," CEA service rates have always been closely regulated under rigorous ILEC cost-based regulation, which ensures that CEA service rates remain just and reasonable without a CLEC rate cap or CLEC benchmark rate.

In the FCC's November 2017 *Primary Jurisdiction Referral Order*, the Commission imposed non-dominant rate regulation on Aureon for the first time consisting of two different maximum rates: (1) a CLEC rate cap of $0.00819,[14] and (2) a CLEC benchmark rate.[15] The Commission also required Aureon to refile its tariff rate, below the CLEC rate cap of $0.00819, with cost studies and supporting data. Aureon's new CEA rate filed in tariff Transmittal No. 36 is $0.00576, which was a 35.71 percent reduction (from $0.00896 to $0.00576) from Aureon's 2013 tariff rate, without applying a CLEC benchmark rate. After AT&T and Sprint filed petitions against Aureon tariff Transmittal No. 36, the Commission imposed additional non-dominant carrier rate regulations upon Aureon's dominant carrier ILEC-regulated service, a CLEC benchmark rate of $ 0.005634.[16] Furthermore, the Commission ordered Aureon to reduce its tariff rate by at least an additional 2.19 percent (from $0.00576 to $0.005634).[17]

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[13] *2007 Just and Reasonable Rates NPRM*, 22 FCC Rcd. at 17994, ¶ 10.

[14] *Primary Jurisdiction Referral Order*, ¶ 24.

[15] *Id.*

[16] *Rate Order*, ¶¶ 2, 35.

[17] *Id*. ¶ 126.

The Commission has repeatedly distinguished between CLECs, which have never been subject to cost-based rate regulation, and dominant carriers like Aureon that have always been regulated as ILECs.[18] The Commission's repeated rejections of cost-based rate regulation for "all" CLECs, while subjecting CEA service providers to ILEC cost-based rate regulation for more than 30 years, further supports the conclusion that the Commission's rules have never, prior to the *Primary Jurisdiction Referral Order*, regulated Aureon as a CLEC.[19] As the Commission has already determined that a tariff rate that complies with the Commission's ILEC cost-based rate regulations is just and reasonable,[20] the CEA tariff rate would not be made more just and reasonable by imposing a CLEC benchmark rate and there would be no purpose served by such a CLEC benchmark rate.

There can be no dispute that the Section 61.26(f) benchmark rate rule is contained in Subpart C, which is entitled "General Rules for Nondominant Carriers." There is also no dispute that CEA service is not a "nondominant carrier" service. Therefore, it should be evident that the Commission should not apply Section 61.26 to CEA service.

Furthermore, rather than a CLEC, the Commission has always regulated CEA service more like an ILEC service. There is no dispute that the Commission has always imposed full cost-based ILEC regulation on CEA service as a dominant carrier service. The Part 32, 36, 64, and 69 Rules, which the Commission applied in this tariff investigation and which the Commission has always applied to CEA service since its inception more than 30 years ago, only

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[18] *See Seventh Report and Order*, 16 FCC Rcd. at 9926 ¶¶ 8-9, 9931, ¶ 21, 9937, ¶ 37, & 9939, ¶ 41.

[19] *Id* at 9939, ¶ 41; *See also*, Access Charge Reform, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, 9136, ¶ 57 (2004).

[20] *Seventh Report and Order*, 16 FCC Rcd. at 9939, ¶ 41.

apply to ILECs. For example, Section 69.1(a) clearly states that Part 69 applies only to "telephone companies," which section 69.2(hh) defines as ILECs.[21] Specifically, Section 69.1(a) states, in relevant part, "[t]his part establishes rules for . . . telephone companies". Section 69.2(hh) defines the term "telephone company" as: "an incumbent local exchange carrier as defined in section 251(h)(1) of the 1934 Act as amended by the 1996 Act."[22] Consequently, the Commission's Electronic Tariff Filing System ("ETFS") still lists Aureon's CEA tariff as a service provided by an ILEC. Indeed, AT&T's counterclaims, which form the basis of AT&T's complaint on referral leading to the FCC's *Primary Jurisdiction Referral Order*, states that Aureon is an ILEC.[23] Aureon is also wholly-owned by ILECs and CEA service made it possible for those ILECs to comply with the Commission's equal access regulations. Reconsidering the Commission's classification of Aureon as a CLEC is the most efficient and legally supportable solution to the controversy AT&T has raised over how to apply Section 61.26(f) CLEC regulation to an ILEC-regulated dominant carrier service like CEA.

With regard to AT&T's Petition for Reconsideration, AT&T asserts that the Commission correctly identified CenturyLink as the competing ILEC to which Aureon's dominant carrier rates must be benchmarked, but that the FCC incorrectly calculated the CEA composite rate when it used Aureon's weighted average mileage, rather than using CenturyLink's alleged

[21] 47 C.F.R. §§ 69(1)(a), 69.2(hh).

[22] *Id.*

[23] *See* AT&T's Answer and Counterclaims, ¶¶ 66-69, *INS v. AT&T*, Civil Action No. 14-3439 (D. N.J. filed Aug. 4, 2014) ("INS has operated, and has consistently been treated by the FCC, as subject to rate-of-return regulation. . . . As recent FCC orders confirm, entities that now file access service tariffs according to Rule 61.38 are rate-of-return, incumbent local exchange carriers. . . . However, having long received benefits from its rate-of-return classification, INS cannot now disclaim that classification . . . ."). Relevant excerpts from AT&T's Answer and Counterclaims are attached hereto as Exhibit A.

mileage.[24] Aureon does not agree that Aureon is a CLEC, or that Aureon must benchmark its rates to CenturyLink's rates in lieu of Aureon's ILEC-regulated, cost-based rates. Nonetheless, to the extent that the Commission decides to uphold its decision that CenturyLink's rates are relevant to calculate the CLEC benchmark rate for Aureon's dominant carrier service, the Commission was correct in ruling that Aureon's average weighted mileage must be used when calculating the composite rate to which Aureon's CEA service rate is benchmarked.

II. ARGUMENT

AT&T contends that in order to calculate the CLEC benchmark rate applicable to Aureon's ILEC-regulated service, the FCC must identify the following: (1) the competing ILEC that would handle the traffic in the absence of Aureon; (2) the access services that the competing ILEC would provide in lieu of the service Aureon provided to transport that traffic; and (3) the resulting rate charged by the competing ILEC for those same services.[25] Assuming, *arguendo*, that CenturyLink is the competing ILEC,[26] AT&T's methodology used to calculate the benchmark rate is wrong. To the extent that the CLEC benchmark rate applies to Aureon's ILEC-regulated service, and Aureon does not concede that it does, the Commission correctly calculated the composite rate in accordance with the FCC's rules as further detailed below.

First, AT&T mischaracterizes and misreads the language in the FCC's rules, the FCC's orders adopting the CLEC benchmark rate, and the *Rate Order* to reach AT&T's desired outcome, to pay Aureon less. AT&T disingenuously adds additional requirements that are not in

[24] AT&T Petition at 1-2.

[25] *Id.* at 4-5.

[26] If Aureon is a CLEC to which the CLEC rate benchmark applies, Aureon continues to assert, and does not waive its position, that the competing ILECs are the LECs that subtend Aureon's CEA network, and that Aureon would qualify as a rural CLEC.

the FCC's orders or rules to contrive arguments that the Commission should have used a different approach to calculate the $0.05634 CLEC benchmark rate applicable to Aureon's CEA service.

Second, the FCC correctly applied CenturyLink's per mile rate to Aureon's average weighted mileage to determine the amount of transport to incorporate into the Commissions' composite rate calculation for the CLEC benchmark rate. The FCC was not required to use CenturyLink's network to determine the distance-sensitive charge; rather, the FCC correctly applied CenturyLink's per-mile tandem switched transport rate to the average weighted mileage for Aureon's network to determine the total tandem switched transport component in the composite benchmark rate.

Third, contrary to AT&T's contentions, the FCC's orders do not prohibit Aureon from receiving more than CenturyLink would receive for providing service over CenturyLink's own network. That argument is a red herring because the benchmark rate calculated by the FCC would not provide Aureon with more revenue than CenturyLink would receive for providing the same access service over the same distance that the calls are transported today. Aureon would receive the same amount that CenturyLink would for providing that transport service.

Fourth, AT&T's assertions that the FCC's approach would not constrain the exercise of monopoly power and encourage arbitrage are wrong. Aureon has always been regulated under the FCC's dominant carrier rules, and despite the Commission ruling for the first time that Aureon is a CLEC for CLEC rate cap and benchmark rate purposes, Aureon continues to be subject to the FCC's ILEC rate regulations. As such, Aureon has always been treated more like an ILEC than a CLEC, and the application of non-dominant CLEC rules to Aureon is inapt. Imposing a non-dominant carrier rate cap and benchmark rate upon Aureon's dominant carrier

service is unwarranted because ILEC rate regulations already ensure that Aureon's tariff rates remain just and reasonable. Moreover, Aureon is the only company that has proposed a new FCC rule that would directly outlaw all arbitrage.[27]

A. The Commission Correctly Interpreted and Applied its CLEC Benchmark Rate Rules to the Extent that Aureon is Even a CLEC.

In the *Rate Order*, the Commission recognized that Aureon has a completely different rate structure than CenturyLink. Aureon's transport rate does not vary with mileage, but CenturyLink's rate does. Aureon uses a rate structure with a single rate element on a per-minute of use ("MOU") basis, whereas CenturyLink has a multi-element rate, including a per mile transport rate, which the FCC translated into a single per-MOU rate when calculating the CLEC benchmark rate.[28]

Although the FCC stated that Aureon's rate structure is consistent with the Commission's orders pertaining to the CLEC benchmark, which allow CLECs flexibility in establishing their rate structures, the FCC also acknowledged that Aureon first tariffed its CEA service using a single rate element rate structure on a per-MOU basis in 1989.[29] The FCC's approval of Aureon's initial tariff *pre-dated* all of the FCC's orders regarding CLECs, including those regarding the CLEC benchmark rate and any flexibility granted to CLECs with regard to the pricing of access service. Aureon's rate structure was, therefore, not established to be consistent

[27] *See* Comments of Iowa Network Services, Inc. d/b/a Aureon Network Services, *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155 (filed July, 19, 2018); Reply Comments of Iowa Network Services, Inc. d/b/a Aureon Network Services, *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155 (filed Aug 3, 2018).

[28] *Rate Order*, ¶ 36-37.

[29] *Id.* ¶ 37 (citing *Iowa Network Access Division* Tariff F.C.C. No. 1, Transmittal Nos. 1, 6, and 10, Order, 4 FCC Rcd. 3947 (1989)).

with the FCC's CLEC benchmark rate orders, but rather, to comply with the dominant carrier ILEC rate regulations under which the FCC approved Aureon's original rate structure.

AT&T contends that under the CLEC benchmarking rules, "the proper focus is on the ILEC that would provide the service the CLEC did not, the service that ILEC *would* provide, and the rate that ILEC *would* charge for that service", and cites Section 61.26(f) in support of those propositions.[30] AT&T further accuses the Commission of incorrectly assuming the following: (1) the FCC's rules require CenturyLink's rate structure to be transposed onto Aureon's network; (2) CenturyLink's mileage would improperly preclude Aureon from recovering its transport costs; and (3) AT&T's criticism of Aureon's proposed benchmark rate was based on Aureon's existing rate structure.[31] AT&T's accusations are meritless. The FCC correctly interpreted and applied its own rules to calculate the CLEC benchmark rate.

First, Section 61.26(f) does not support AT&T's contention that the focus of the inquiry is on the rates or service that the competing ILEC "would" provide. Section 61.26(f) states that the relevant standard is "the rate *charged* by the competing ILEC for *the same access services* . . . . "[32] The rule is worded in the past tense regarding the rate actually charged by CenturyLink for the services provided by Aureon ("the rate charged"), not the non-existent theoretical future tense (i.e., "would provide," or "would charge") under AT&T's misreading of the rule. The FCC determined, and AT&T does not dispute, that CenturyLink's mileage-based tandem-switched transport rate must be used to determine the charge for CEA traffic that is transported between a central tandem switch and the several points of interconnection ("POIs") where the traffic is

[30] AT&T Petition at 16 (emphasis added).

[31] *Id.*

[32] 47 C.F.R. § 61.26(f) (emphasis added).

handed off to the LECs.[33] Indeed, AT&T acknowledges that Section 61.26(f) "require[s] CLECs to benchmark their rate against the 'rate *charged by* the competing ILEC'".[34] This is precisely the standard that the FCC used. The FCC used CenturyLink's *tandem-switched transport per mile rate* of $0.000030, and applied CenturyLink's *rate* to the average weighted miles for the transport service that is actually provided by Aureon to calculate the charge for the mileage component of the benchmark rate calculation.

Second, the *Eighth Report and Order* does not support AT&T's contention that the CLEC benchmark rules do not apply the competing ILEC's rates to a CLEC's network. AT&T alleges that the "Commission's discussion of blended rates in the *Eighth Report and Order* further confirms that [the] CLEC benchmark rate must, in fact, be based on "something other than the actual network used."[35] However, the Commission's discussion in the *Eighth Report and Order* regarding blended rates charged by CLECs for access service only applies "when more than one incumbent LEC operates within a competitive LEC's service area." AT&T and the FCC both agree that the only ILEC rates relevant to calculating the CLEC benchmark rate are CenturyLink's rates. No other ILEC rates were considered by AT&T or the FCC, and no blended ILEC rates were used by the Commission to determine the CLEC benchmark rate in this case.[36] As further discussed in Section II.C below, the FCC's decision regarding blended rate charges is also inapplicable to this proceeding because access charges based on blended ILEC rates, which was not involved in either AT&T's or the FCC's benchmark rate calculations,

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[33] *Rate Order*, ¶ 37; AT&T Petition at 16-17.

[34] AT&T Petition at 18 (emphasis original).

[35] *Id.* at 19 (quoting *Rate Order*, ¶ 42).

[36] Paragraph 48 of the *Eighth Report and Order* actually supports Aureon's position that the competing ILECs are the subtending LECs because the end users reside in the service areas of those carriers.

require the CLEC's end-users to reside in the area served by the CLEC. Aureon's CEA service does not have any end users.

If on reconsideration the Commission decides that Section 61.26 is inapplicable to an ILEC rate regulated service like CEA, then the Commission can avoid any further inquiry into whether CenturyLink's per mile transport service is the "same" as non-distance sensitive CEA service. Section 61.26(f) requires a CLEC benchmark rate to be calculated on the basis of "the rate charged by the competing ILEC for the same access services." The rule refers to a rate that has already been charged by the competing ILEC for the same service that the competing ILEC has already provided. However, AT&T's petition for reconsideration repeatedly adds the term "would" to suggest that the benchmark rate could be a rate that CenturyLink has never charged.

The plain words of Section 61.26, rather than how AT&T seeks to modify it, demonstrate that there is no CenturyLink rate to which a rate for CEA service could be benchmarked. CenturyLink has never "charged" a non-distance-sensitive transport rate nor provided a non-distance-sensitive CEA service. Furthermore, section 61.26(a)(3) only includes a "per mile" or distance-sensitive tandem switched transport facility service in the list of services that are functionally equivalent to a competing ILEC's service. CenturyLink also does not charge a rate for the equal access functionality provided by CEA service. The CEA network's concentration of traffic from several POIs to a central access tandem provides a service that is not provided by CenturyLink and benefits for smaller IXCs and new entrants that the Commission's *Section 214 Order* concluded could not be provided by CenturyLink's predecessor's service.

B. The FCC Correctly Used Aureon's Actual Network and Average Weighted Mileage to Calculate Transport on a Per-MOU Basis.

The plain language in Section 61.26(f) requires the application of the ILEC rate to the CLEC's network. Nonetheless, AT&T avers that Section 61.26(f) requires the FCC to focus on

the services that CenturyLink provides, and the rate that CenturyLink charges for that service.[37] AT&T further argues that the FCC's orders adopting the CLEC benchmark rules show that CenturyLink's rates must be applied to CenturyLink's network, rather than the network of the CLEC that is providing the access service. AT&T is wrong. AT&T rearranges the order of the words in Section 61.26(f) and also adds additional words to change its meaning, and the FCC's orders adopting the CLEC benchmark rules do not support AT&T's arguments.

First, AT&T misstates the plain language of Section 61.26(f) when it argues that the rule requires "CLECs to benchmark their rate against the 'rate *charged by* the competing ILEC' to 'send traffic to or from an end user not served by that CLEC.'"[38] Section 61.26(f) actually states that "[i]f a CLEC provides *some portion of the switched access services* used to send traffic to or from an end user not served by that CLEC, the rate for the *access services provided* may not exceed the rate charged by the competing ILEC for the *same access services* . . . ."[39] AT&T misleadingly changes the order of the words in the rule to falsely claim that the rule requires the competing ILEC's rate to be applied to a network that is not the CLEC's actual network. However, when the words in Section 61.26(f) are read in the proper order, it is clear that if the CLEC provides any part of the access services, then the ILEC rate is applied to those "same services," i.e., those that are provided by the CLEC. It makes perfect sense that the reference to "same services" in the rule cannot mean the services the CenturyLink "would provide" as argued by AT&T because CenturyLink's services would not be the same as those actually provided by Aureon, and the rule makes no reference at all to the services that the ILEC "would provide" as

[37] AT&T Petition at 16.

[38] *Id.* at 19 (quoting 47 C.F.R. § 61.26(f)) (emphasis added by AT&T).

[39] 47 C.F.R. § 61.26(f).

argued by AT&T. The portion of the service provided by Aureon to AT&T is CEA service, and Section 61.26(f) requires the FCC to apply CenturyLink's rates to "the same access services," i.e., CEA service. AT&T rewrites the rule to mean that the ILEC rate applies to the network not provided by the CLEC, which is not found anywhere in the text of the rule.

Second, AT&T quotes the FCC's *Rate Order*, access charge reform decisions, and benchmark rate rules out of context, and the FCC's orders and rules do not support AT&T's position that the per-mile tandem-switched transport charge must be based on the competing ILEC's network. AT&T argues that the blended rate requirements established by the *Eighth Report and Order*, which, as discussed above, is inapplicable here, means that the "CLEC benchmark rate must, in fact, be based on "'something other than the actual network used.'"[40] What the FCC correctly held in the *Rate Order* is that "[t]he Commission has *never* required that the mileage component of competitive LEC transport rates reflect something other than the actual network used, which is what AT&T would have us do here."[41]

Third, AT&T's argument that the FCC erred in computing the per-mile tandem-switched transport amount in violation of Section 69.111(a)(2)(i) is also without merit. AT&T contends that Section 69.111(a)(2)(i) requires the transport charge to be based on the competing ILEC's network because that section states that "[T]andem-switched transport shall consist of . . . [a] per-minute charge for transport of traffic over common transport facilities between the incumbent local exchange carrier's end office and the tandem switching office."[42] However, that section is only relevant to the computation of transport charges provided by the ILEC, and that

[40] AT&T Petition at 19 (quoting *Rate Order*, ¶ 42).

[41] *Rate Order*, ¶ 42 (emphasis added).

[42] AT&T Petition at 8 (quoting 47 C.F.R. § 69.111(a)(2)(i), AT&T internal quotation marks and emphasis omitted).

are contained in the ILEC's own tariff. Section 69.111 does not apply to CLECs. CLECs have never been subject to Part 69 of the Commission's rules because such rules for cost-supported rates have only ever been applied to ILECs.[43] The FCC specifically noted in the *Seventh Report and Order* that CLECs could recover for the services they provide to IXCs, including transport, as long as the aggregate rate charged did not exceed the benchmark rate:

> Switched access service typically entails: (1) a connection between the caller and the local switch, (2) a connection *between the LEC switch and the serving wire center* (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most *CLECs seek compensation for the same basic elements*, however precisely named: (1) common line charges; (2) local switching; and (3) transport. *The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark*.[44]

The *Seventh Report and Order* clearly contemplated that a CLEC that provides transport to IXCs between the CLEC's tandem switch and a LEC's end office may charge IXCs for that service as long as the *aggregate charge* does not exceed the benchmark rate. In order to determine the per mile switched transport amount for the benchmark rate calculation, the FCC had to "decide whether the rate should be based on miles for which a typical IXC connecting to CenturyLink for tandem-switched transport service would pay CenturyLink or on the miles for which such an IXC would pay Aureon if it interconnected with Aureon's actual network."[45] The FCC appropriately noted that it has never required the mileage component of CLEC transport rates to reflect something other than the actual network used.[46] Assuming, *arguendo*, that Aureon was a CLEC, the Commission properly applied CenturyLink's mileage-based tandem-

[43] *See* 47 C.F.R. §§ 69.1(a) and 69.2(hh).

[44] *Seventh Report and Order*, ¶ 55 (emphasis added).

[45] *Rate Order*, ¶ 38.

[46] *Id.* ¶ 42.

switched transport rate to Aureon's average weighted mileage between Aureon's CEA tandem and the POIs, which is consistent with the CLEC benchmark rate mechanism adopted in the *Seventh Report and Order*, and the plain language in the FCC's benchmark rate rules.

C. The Benchmark Rate Calculated by the FCC Would not Provide Aureon With More Revenue Than CenturyLink Would Receive for Providing the Same Access Service.

AT&T avers that the Commission also erred because the benchmark rate calculated using Aureon's average weighted mileage would result in revenue higher than what CenturyLink would receive. That result, according to AT&T, is prohibited by the FCC's *Seventh Report and Order*. AT&T contends that outside the blended rates context discussed in the *Eighth Report and Order*, the Commission's *Seventh Report and Order* structured the CLEC access charge rules to only allow CLECs to receive revenues equivalent to those ILECs receive from IXCs, regardless of the CLEC's rate structure.[47] However, the *Rate Order* complies with that requirement because Aureon would not receive any more revenues than CenturyLink would receive under CenturyLink's rates. The Commission used CenturyLink's rates, and applied those rates to actual mileage for CEA service to calculate the benchmark rate. Assuming, *arguendo*, that CEA is a CLEC service and that CenturyLink would not need to increase its rates to provide CEA service, then applying CenturyLink's rate to CEA service results in Aureon receiving the same dollar amount that CenturyLink would have received for providing the same service, i.e., CEA service, that Aureon provided to AT&T.

Blended rates are also not relevant to the FCC's benchmark rate calculation for CEA service. The blended rate concept is "based on the access rate that would have been charged by

[47] AT&T Petition at 20 (citing *Seventh Report and Order*, ¶ 54).

the incumbent LEC in whose service area that particular end-user resides."[48] The end-user customers that send and receive calls routed over Aureon's CEA network are not served by CenturyLink. Rather, they are served by the rural LECs that subtend Aureon's network. As such, the revenues that CenturyLink would have received with blended rates is completely irrelevant since CEA service does not provide access to CenturyLink's end users. Rather, CEA service provides access to the networks of the subtending LECs, which, in turn, provide the IXCs with access to the subtending LECs' end users. The FCC's discussion in other proceedings regarding blended rates is inapplicable to the instant proceeding, and AT&T's arguments that Aureon would receive more revenue than CenturyLink would for the same service are without merit.

D. AT&T's Assertions That the *Rate Order* Fails to Constrain Monopoly Power or Encourages Arbitrage are Without Merit Because Aureon's Rates Have Always Been, and Continue to be, Regulated Under Cost-Based ILEC Rules.

AT&T argues that the FCC's approach of applying CenturyLink's rates to Aureon's network would enable Aureon to charge "supra-competitive" prices for that service.[49] AT&T's allegations are without merit because, as discussed above in Section I, Aureon has always been subject to strict and intricate cost-based ILEC regulations, which ensure that Aureon does not earn more than its FCC authorized rate of return. ILEC rate regulations ensure that CEA service rates remain just and reasonable without a CLEC benchmark rate.

By regulating Aureon under both ILEC and CLEC rate rules, the Commission has created an inconsistent and irreconcilable situation. As a CLEC, Aureon's CEA rate is presumptively considered to be a just and reasonable rate that does not have to be cost-justified if the rate is

[48] *Eighth Report and Order*. ¶ 47.

[49] AT&T Petition at 13.

below the $0.005364 CLEC benchmark rate, but that rate must nonetheless be supported by cost studies as an ILEC rate. The CLEC rules allow a CLEC to bill the CLEC benchmark rate even if the CLEC benchmark rate is higher than the cost-based rate. However, the ILEC rate rules allow the billing of a cost-based rate even though the cost-based rate is above the CLEC benchmark rate. A myriad of other issues are dragged into this regulatory morass, such as whether under the FCC's approach, the "deemed lawful" status of a tariff rate under Section 204(a)(3)[50] has any meaning whatsoever if an ILEC-regulated rate, such as Aureon's 2013 FCC tariff rate, can be suddenly declared void *ab initio* years after it has been filed with the Commission.

The Commission can also avoid these and other complex issues by ruling on reconsideration that CEA service will continue to be subject to cost-based ILEC rate regulation under Section 61.38, as it always has, without the unwarranted addition of a CLEC benchmark rate. The Commission justified the CLEC benchmark rate upon the "backstop" that a CLEC could always make up the resulting revenue shortfall to recover its costs by increasing rates to end users.[51] However, CEA service does not have any end users to which Aureon could bill higher rates to offset the loss in cost recovery caused by a CLEC benchmark rate. If Aureon's rates fully comply with the FCC's accounting rules for ILECs, Aureon's rates are just and reasonable. By contrast, an arbitrary rate cap based on another carrier's (i.e. CenturyLink's) costs and a different network would result in unreasonable rates in violation of Sections 201 and 251(b)(5) of the Act if they are not sufficient to recover the costs of providing CEA service.[52]

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[50] 47 C.F.R. § 204(a)(3).

[51] *Seventh Report and Order*, ¶¶ 39, 43; *Eighth Report and Order*, ¶ 58.

[52] To the extent CenturyLink's rates phase down to zero under bill-and-keep, a CLEC benchmark rate would result in zero compensation for CEA service. Zero compensation is obviously not just or reasonable compensation. Therefore, a CLEC benchmark rate would violate Sections 201 and 251(b)(5) (requiring reciprocal compensation) of the Act. Imposing a CLEC benchmark rate on CEA service would also violate the Takings Clause of the Fifth Amendment to the United

AT&T also wrongfully accuses the Commission of "encouraging" arbitrage.[53] Aureon's non-distance-sensitive transport rate prevents arbitrage, such as mileage pumping, as the same rate applies regardless of whether the traffic is transported 100 miles or 1 mile. Moreover, Aureon continues to be regulated under Section 61.38, which also prevents arbitrage, such as traffic pumping, by requiring the CEA tariff rate to decline as traffic volume increases. Furthermore, it is important to note that Aureon is the only company that proposed a rule in the pending Commission access arbitrage rulemaking that would directly outlaw all arbitrage as an unjust and unreasonable practice.

Because Aureon continues to be regulated as an ILEC that must base its rates on costs, and Aureon cannot benefit from arbitrage because its rates decline as traffic volumes increase, AT&T's arguments that the Commission's *Rate Order* fails to appropriately address monopoly or arbitrage issues are without merit.

III. CONCLUSION

Aureon is a dominant carrier that is subject to Section 61.38 and ILEC rate regulations, which require Aureon to file cost and traffic studies to support its tariff filings. CEA service rates have always been regulated under cost-based regulations for ILECs, which ensure that CEA service rates remain just and reasonable. The imposition of the CLEC rate benchmark and CLEC rate cap rules conflicts with ILEC regulation of Aureon's rates and Aureon's status as a dominant carrier that is required to file cost-justified rates. CLECs are permitted to bill the CLEC benchmark rate, as rates within the "safe harbor" established by the Commission are just and reasonable. However, the *Rate Order* would prohibit Aureon from charging the $0.005634

States Constitution by forcing Aureon to allow the public to physically connect with and use Aureon's network without just compensation.

[53] AT&T Petition at 14.

CLEC benchmark rate if ILEC rate regulations and cost studies calculate a rate lower than the CLEC benchmark rate. Reconsidering the Commission's classification of Aureon as a CLEC is the most efficient and legally supportable solution to the controversy AT&T has raised over how to apply Section 61.26(f) CLEC regulations to an ILEC-regulated service like CEA.

If the Commission decides to affirm its decision that Aureon is a CLEC subject to Section 61.26(f), the Commission should treat Aureon like other CLECs that are permitted to charge the CLEC benchmark rate without cost justification. Furthermore, if the FCC is determined to regulate Aureon as a CLEC, the Commission should find that the Commission properly calculated the CLEC benchmark rate applicable to Aureon's CEA service, and deny AT&T's Petition for the reasons stated herein.

Respectfully submitted,

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Dated: September 19, 2018

EXHIBIT A

Relevant Excerpts from AT&T's Answer and Counterclaims

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IOWA NETWORK SERVICES, INC., an Iowa corporation, Plaintiff, v. AT&T CORP., Defendant.	:	Civil Action No. 14-3439 (JAP-LHG)

DEFENDANT'S ANSWER AND COUNTERCLAIMS

Defendant AT&T Corp. ("AT&T") respectfully submits this Answer and Counterclaims to the Complaint brought by Plaintiff Iowa Network Services, Inc. ("INS" or "Plaintiff").

ANSWER[1]

1. Plaintiff Iowa Network Services, Inc. ("INS"), by its attorneys, brings this Complaint against Defendant AT&T Corp. ("AT&T" or "Defendant") and alleges as follows:

RESPONSE: AT&T admits that INS is bringing a complaint against AT&T. AT&T denies the remaining allegations in this paragraph.

[1] AT&T restates the allegations of the Complaint for the convenience of the parties, but by doing so does not adopt or acknowledge the validity of those allegations except as specifically set forth herein.

services pursuant to Rule 61.38 of the FCC's rules. 47 C.F.R. § 61.38. *See* Compl. ¶ 54 (stating that INS files under 47 C.F.R. § 61.38).

66. As recent FCC orders confirm, the entities that now file access service tariffs according to Rule 61.38 are rate-of-return, incumbent local exchange carriers.[3] Thus, by filing under Section 61.38, INS has represented to the FCC that is it a rate-of-return carrier.

67. In fact, INS has itself made regulatory filings, along with other centralized equal access providers in other states, in which INS has stated that "[t]he CEA providers *are regulated on a rate-of-return basis*." Comments of the Equal Access Service Providers, WC Docket No. 05-337, at 2 (filed Nov. 26, 2008). This filing was signed by "Richard Vohs," who was identified as the President of INS.

68. In reliance on INS's identification of itself as a Section 61.38 rate-of-return carrier, the FCC has permitted INS to file tariffs for access services, without undertaking the burdens associated with a full-blown cost case (in such a case, the FCC would scrutinize particular expenditures as reasonable). INS has, in turn, received reciprocal benefits from its rate-of-return classification, including filing tariffs that did not require a full-blown cost case, and collecting millions of dollars in access services under those filed tariffs.

69. INS now attempts to assert that "it is not an incumbent local exchange carrier" and "is not a Rate-of-Return Carrier." Compl. ¶¶ 77. However, having long received benefits

[3] *See, e.g.*, *In re FCC 11-161*, 753 F.3d 1015, 2014 WL 2142106, at *109 (10th Cir. 2014) (stating "ILECs can obtain relief from rate adjustments by submitting cost studies under 47 C.F.R. § 61.38"); *Direct Commc'ns Cedar Valley v. FCC*, 2014 WL 3338841, at *63 (FCC July 7, 2014) (explaining that section 61.38 "called for incumbent LECs to file tariffs supported by cost-of-service data"); *In re July 1, 2014 Annual Access Charge Tariff Filings*, 29 FCC Rcd. 3133, *1, n.2 (Mar. 25, 2014) (establishing "procedures for filing of annual access charge tariffs . . . for . . . rate of return ILECs subject to sections 61.38 and 61.39" and noting that 47 C.F.R § 61.38 applies to "rate of return carriers that file tariffs based on projected costs and demand"); *Connect America Fund Order*, ¶ 684 ("Rate of Return Carriers Filing Tariffs Based On Projected Costs and Demand: Section 61.38."); *In re July 3, 2012 Annual Access Charge Tariff Filings*, 27 FCC Rcd 7322, 7327 n.2 (F.C.C. 2012) ("These tariffs were filed pursuant to . . . section 61.38 for rate-of-return LECs.").

from its rate-of-return classification, INS cannot now disclaim that classification in an attempt to avoid the recently imposed negative consequences of such a classification -- *i.e.*, being subject to the *Connect America Fund Order* rules.

70. Because INS is a rate-of-return carrier, it is subject to the rule governing rate-of-return carriers in the Transitional Access Service Rules. 47 C.F.R. § 51.909 ("Transition of rate-of-return carrier access charges"). That rule provides that

> (a) Notwithstanding any other provision of the Commission's rules, on December 29, 2011, a Rate-of-Return Carrier shall:
>
> (1) cap the rates for all elements of services. . . contained in the definitions of End Office Access Service, Tandem Switched Transport Access Service, and Dedicated Transport Access Service, as well as all other interstate switched access rate elements, in its interstate switched access tariffs at the rate that was in effect on the December 29, 2011; and

47 C.F.R. § 51.909.

71. That rule also provides that INS should gradually reduce its intrastate access services rates. *Id.* § 51.909(b)-(d).

72. INS plainly violated Rule 51.909 by failing to reduce its tariffed intrastate access rates, and by charging rates in its tariff above the price caps established in the Transitional Access Service Rules. INS's rates were therefore unlawful.

2. In the Alternative, If INS Is Not a Rate-of-Return Carrier, It Is a CLEC, And CLECs Are Also Subject to the Transitional Access Service Rules.

73. To the extent that INS is not found to be a rate-of-return carrier for the purposes of the Transitional Access Service Rules, then, in the alternative, AT&T avers that INS is a competitive LEC, or CLEC. CLECs, like all carriers providing access services, are also subject to the Transitional Access Service Rules. *See Connect America Fund Order*, ¶¶ 798, 800-01; 47 C.F.R.§ 51.911. Accordingly, if INS is not a rate-of-return carrier (as it argues), then it must be

CERTIFICATE OF SERVICE

I, Tony S. Lee, hereby certify that on this 19th day of September 2018, copies of the foregoing document were sent to the following:

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